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No. 81-2334

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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THE WHITE MOUNTAIN APACHE TRIBE, a body corporate established pursuant to § 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476) and duly recognized by the Secretary of the Interior,

*Petitioner,*

v.

WILLIAM FRENCH SMITH,
Attorney General of the United States of America,

and

JAMES G. WATT, Secretary of the
United States Department of the Interior,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### ABSOLUTE IMMUNITY MUST NOT BE PERMITTED TO CLOAK ILLEGAL, ARBITRARY AND CAPRICIOUS ACTS OF ATTORNEY GENERAL AND SECRETARY OF INTERIOR AS TO BOTH LITIGATING AND NON-LITIGATING CONDUCT

#### A. Bad Faith Is The Hallmark Of Attorney General's Brief In Opposition

There is a shocking impropriety in the Attorney General's attempt to shield bad faith conduct by him and by the Secretary of Interior behind a facade of absolute

immunity. Clear beyond question is the fact that Petitioner White Mountain Apache Tribe, with far better knowledge than the Attorney General of both the facts and law, has rejected as unwanted and highly suspect any representation by the Attorney General and his staff in the contentious Arizona state court water litigation. The Assistant Attorney General, who joined in seeking to prevent the Tribe from having its day in court, is actively attempting to denigrate and diminish the monetary value of the Tribe's invaluable Salt River rights in the Court of Claims, Case No. 22-H.[1] Here, the Tribe is not only seeking to fend off the Assistant Attorney General's attacks in the Court of Claims, it is seeking at all costs to prevent the Attorney General and the Secretary of Interior from subverting the Tribe's Salt River rights to the state court for the benefit of the Secretary's Salt River Federal Reclamation Project and the now abuilding Central Arizona Federal Reclamation Project.

Unable to respond to the Tribe's charges respecting the flagrantly false Salt River claims prepared by the Attorney General and the Secretary of Interior, the Assistant Attorney General seeks here to avoid judicial exposure of bad faith conduct by invoking absolute immunity.[2]

### B. Admission Of Charges By Petitioner Tribe Against Attorney General And Secretary Of Interior

In Petitioner Tribe's verified Complaint, summarily dismissed by the District Court, it is separately charged

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[1] See, p. 5, *infra*, "Issues Here Transcend. . . ."

[2] See, Appendix A to this Reply. See, Appendix B to this Reply. It will be observed there that the Assistant Attorney General represents, in gross error, that the Department of Interior had "responded substantively" to the Tribe's charges that the Assistant Attorney General and the Secretary of Interior had joined to falsely represent the Tribe's Salt River rights in the claim prepared by the Department of Justice. As can be seen from the Interior Department's May 19, 1982 letter (Pet. App. I, at p. 154a), the statement of the Assistant Attorney General is untrue.

that there is illegal, arbitrary and capricious conduct not only as to the litigating judgment of the Attorney General, but likewise as to the non-litigating conduct of both the Attorney General and the Secretary of Interior.[3]

The Department of Justice moved to dismiss *only* as to the Attorney General and then *only* as to the Attorney General's misconduct involving litigating judgment. By the Motion to Dismiss,[4] the Attorney General admitted not only the misconduct charges directed against that officer by the Tribe as to litigating judgment, but likewise to all aspects of non-litigating misconduct by both the Attorney General and the Secretary of Interior.[5]

Assuming arguendo only that the Attorney General, the District Court and the Court of Appeals could ignore the Tribe's verified Complaint as filed and contrive issues, as they did, the principles of absolute immunity do not include charges of illegal, arbitrary and capricious conduct on the part of the Attorney General, which the Tribe is prepared to prove.[6]

### C. It Is Error To State The Issues Here Could Be Rendered Moot

There is a single issue here: Is the Attorney General empowered to force rejected and unwanted representation upon the Tribe in western water litigation when that officer is, as here, immersed in irreconcilable conflicts of Interest? In the Ninth Circuit's *Northern Cheyenne* and *San Carlos* decisions, it is understated that the Attorney General's representation is inadequate where, as here, that officer is encompassed with conflicts of interest.[7] The conflict of interest issue is *not* raised in the pending

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[3] See, Pet., at pp. 4, *et seq.*

[4] See, Pet. App. G, at p. 18a.

[5] See, Pet., at p. 4, paras. A, *et seq.*

[6] *Ibid.*, at pp. 4, 22 & 23.

[7] *Ibid.*, at pp. 15, *et seq.*

petitions for certiorari in the *Northern Cheyenne* and *San Carlos* cases. As stressed in the Tribe's Petition, the *Northern Cheyenne* and *San Carlos* decisions are diametrically opposed to the plain and serious errors contained in the opinion of the Court of Appeals for the District of Columbia Circuit.[8]

**D. "Fraud" And The "Badges Of Fraud"** [9]

For three-quarters of a century, the Attorney General and the Secretary of Interior have connived to take from Petitioner Tribe its Salt River rights for the benefit of the Salt River Federal Reclamation Project. If successful in denying the Tribe its day in court by the summary dismissal of the Tribe's verified Complaint, those officials will have succeeded in their confiscatory efforts.

There is no merit to the contention by the Justice Department in its Brief in Opposition that the Tribe could protect itself in the state court.[10] These are the facts respecting the state court into which the Attorney General and the Secretary of Interior seek to force Petitioner Tribe. Early on—in 1910—the Attorney General appeared in that state court and procured the entry of the *Kent Decree*. By the *Kent Decree*, the Indian tribes, who were unfortunate enough to be represented by the Attorney General, were stripped of their reserved rights by the Attorney General. An appearance by the Tribe in that state court would unquestionably result in the Tribe likewise being stripped of its reserved rights for the benefit of the Secretary's Salt River Federal Reclamation Project and the now abuilding Central Arizona Federal Reclamation Project. That is the end product which the Department of Justice seeks to shrug off in its Brief in Opposition.

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[8] *Ibid.*, at pp. 9, *et seq.*; see, Pet. App. A, *et seq.*

[9] Pet. App. H, at p. 42a.

[10] Brief in Opposition, at pp. 8-9.

Only the foolish or the corrupt would voluntarily take Petitioner Tribe's Salt River rights into the state court where both the Secretary of Interior and the Attorney General seek to subvert the Tribe and its rights. The Tribe is prepared to prove these facts. The summary dismissal, in effect, cloaks corrupt conduct.

### E. Issues Here Transcend Attorney General's Misconduct—State Jurisdiction

The anxiety displayed by the Attorney General and the cover-up, which evoked the claim of absolute immunity against the Tribe's action, is understandable on this background:

1. There is pending before the Court of Claims Case No. 22-H. That proceeding was initiated by Petitioner White Mountain Apache Tribe to recover damages for mismanagement by the Attorney General and the Secretary of Interior—but not for the taking—of the Tribe's natural resources, including its Salt River rights.

2. In regard to the Arizona state court water rights proceeding, the Assistant Attorney General prepared a flagrantly false "Water Rights Claim Of The United States As Trustee For The White Mountain Apache Tribe." In explicit terms, in a letter dated April 14, 1982, Ronnie Lupe, Chairman of Petitioner Tribe, challenged the "Water Rights Claim" demanding that the Attorney General retract statements made in the claim.[11] Alternatively, the Attorney General was requested to send personnel to the Tribal Council to justify the manifest errors in the "Water Rights Claim." Last month, August 18, 1982, the Attorney General, through the Assistant Attorney General, belatedly and in error, attempted to respond

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[11] See, Appendix A to this Reply, letter dated April 14, 1982, from Ronnie Lupe, Chairman of Petitioner White Mountain Apache Tribe, to Respondent William French Smith, Attorney General.

to the Tribe's April 14, 1982 demands.[12] Among other things, it is there stated, in error, that the Secretary of Interior had "responded substantively" to the Tribe's charges against the Attorney General. That statement is untrue, as can readily be discerned from the letter from the Department of Interior to Chairman Lupe.[13]

3. By preparing the "Water Rights Claim" in the Salt River in a manner that is flagrantly in error, the Assistant Attorney General not only undertook to denigrate Petitioner Tribe's rights as they pertain to the on-going Salt River litigation, but likewise gravely undercut the Tribe's rights in the Court of Claims Case No. 22-H.

By a single stroke, the Assistant Attorney General seeks to diminish the Tribe's Salt River rights in the state court for the benefit of the federal reclamation projects and simultaneously seeks to reduce the claim against which that officer is defending in the Court of Claims.

The posture of the Assistant Attorney General under the circumstances is grossly immoral.

Normally, this Court would disbar an attorney appearing before it immersed in conflicts of interest of the character which pervade all of the conduct of the Assistant Attorney General respecting the Tribe's invaluable Salt River rights. Most assuredly, the concept of absolute immunity does not prohibit judicial review under the undeniable facts set forth above.[14]

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[12] See, Appendix B to this Reply, letter dated August 18, 1982, to Ronnie Lupe, Chairman, from Carol E. Dinkins, Assistant Attorney General.

[13] See, Pet. App. I, at p. 154a.

[14] Pet., at pp. 15, *et seq.*

## MEMORANDUM FOR THE UNITED STATES DEMONSTRATES NEED TO GRANT TRIBE'S PETITION [15]

Reference is made to the Brief in Opposition to the Memorandum for the United States in the *San Carlos* and *Northern Cheyenne* decisions of the Court of Appeals.[16] Reference is likewise made to the Petition of the White Mountain Apache Tribe in the Memorandum last mentioned.[17]

Underscored by the Memorandum for the United States is the impropriety of permitting the Attorney General to represent the tribes in western water litigation. Conflicts of interest and political expediencies govern the course of conduct by the Attorney General, the Assistant Attorney General and their respective staffs. As stressed here, the Assistant Attorney General greatly benefits by denigrating Petitioner Tribe's Salt River rights.[18]

The attack by the Attorney General and the Assistant Attorney General upon the disposition made by the Court of Appeals for the Ninth Circuit in *San Carlos* and *Northern Cheyenne* respecting "The Disclaimer Issue" [19] is similarly self-serving.

A fair-minded disposition of the disclaimer issue could have been predicated upon this correct statement:

> . . . the disclaimer provisions appear to be an express confirmation of the general rule, not the fashioning

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[15] See, Nos. 81-2147 & 81-2188, Arizona v. San Carlos Apache Tribe; Montana v. Northern Cheyenne Tribe, "Memorandum for the United States."

[16] *Ibid.*, at p. 2, note 1.

[17] *Ibid.*, at p. 3, note 2.

[18] See, pp. 5 & 6, *supra*.

[19] See, Nos. 81-2147 & 81-2188, Arizona v. San Carlos Apache Tribe; Montana v. Northern Cheyenne Tribes, "Memorandum for the United States," at p. 9.

> of a new principle. . . . indeed, the Court itself, both before and after the first disclaimer clauses were written in 1889, made clear that absence of an express disclaimer did not oust federal jurisdiction or subject Indian land to State authority.[20]

Rather than stating that the Ninth Circuit's disposition of the disclaimer issue was proper and should be applied to the non-disclaimer states, the Attorney General, as would be expected, aligned himself against the Court of Appeals for the Ninth Circuit and against the western Indians.

It is correct to say that the Department of Justice induced the *Eagle River* decision [21] by seeking a writ of prohibition from the Supreme Court of the State of Colorado against the District Court, in which the *Eagle River* litigation arose.

In *Eagle River*, over strenuous objections, the Attorney General represented to this Court that Indian reserved rights are the same as federal reserved rights. From that course of conduct, grave damages have continued to flow to the tribes.

It is not an overstatement to suggest that the *Eagle River* decision was a preface to disaster for western Indians.[22] There was shortly to follow the *Akin* decision.[23]

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[20] *Ibid.*, at p. 14.

[21] United States v. District Court of Eagle County, 401 U.S. 520 (1971).

[22] United States, Petitioner v. District Court in and for the County of Eagle and State of Colorado, *et al.*, October Term 1971, No. 87, "Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest and Points and Authorities in Support. . . ." at pp. XVI, *et seq.*

[23] Colorado River Conservation District v. United States (Akin), 424 U.S. 800 (1976).

In keeping with the policies espoused by the Attorney General against the Indians, while professing to be their advocate, the conduct of that official can be categorized as another shameful demonstration "of a gross national hypocrisy." [24]

Chief Justice Marshall recognized the obvious in *Worcester*, when he afforded the tribes protection against the state, the mortal enemy of the Indian people.[25] Times have not changed.

## CONCLUSION

The White Mountain Apache Tribe requests that its Petition for Certiorari be granted to the end that the desire of the Attorney General greatly to broaden the concepts of absolute immunity from suit may be defeated and that the Tribe be granted its day in court.

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September 1982

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[24] United States v. Ahtanum Irrigation District . . . and the State of Washington, *et al.*, 236 F.2d 321, 338 (1956).

[25] Worcester v. Georgia, 31 U.S. 515 (1831).

## APPENDIX A

*Executive Office of the Chairman*

WHITE MOUNTAIN APACHE TRIBE

April 14, 1982

The Honorable William French Smith
Attorney General of the
United States of America
Department of Justice
10th & Pennsylvania, N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

In the pending case of *United States v. White Mountain Apache Tribe* in the United States District Court for the District of Arizona, Civil No. 81-1606-PCT-VAC, the Tribe has challenged the power and authority of the Attorney General to force its representation upon the Tribe respecting its invaluable Salt River rights in the Arizona state water rights proceeding, No. W-1. Responding to that challenge, you assert, and at this juncture the courts have agreed, that your "litigating judgment" is beyond judicial review. The Tribe disagrees and will continue to challenge your contentions until there is a final determination on the subject in a court of last resort.

Presently, the case of *United States v. White Mountain Apache Tribe* is in abeyance awaiting a final disposition of recent decisions by the United States Court of Appeals for the Ninth Circuit declaring that the state court lacks jurisdiction over the White Mountain Apache Tribe and the Tribe's Salt River rights. Quite aside from the pending litigation and requiring determination at this time is your responsibility owing to the Tribe as principal agent of the United States, trustee.

Through your subordinates, there was prepared for filing in the above-mentioned No. W-1 proceeding a flagrantly false "Water Rights Claim Of The United States As Trustee For The White Mountain Apache Tribe." That claim, let me stress, was either formulated or approved by both Mr. Steven Carroll of the Department of Justice and Mr. Michael Johns, Assistant United States Attorney, Phoenix, Arizona. Those subordinate officials were fully advised that the data relied upon in the formulation of the water rights claim were grossly inadequate and totally in error. Those subordinates, nevertheless, participated in the preparation and approval of the water rights claim, which would have been filed in the state court on January 14, 1982, had not the court, in *United States v. White Mountain Apache Tribe*, restrained those officials from filing.

I am transmitting to you a copy of the March 9, 1982, Tribal Resolution and the accompanying legal and factual analysis, asserting, among other things, that there must be a complete retraction of the water rights claim and a rejection of the data relied upon in formulating the claim. The retraction of the water rights claim and the rejection of the data relied upon must be in writing to the end that the Tribe can be protected against any use of the claim or the data by claimants who are vigorous adversaries of the rights asserted by the Tribe in the Salt River.

Alternatively, if you do not desire to retract the water rights claim and reject the data upon which it was formulated, the Tribe requests that you direct Mr. Carroll and Mr. Johns of your staff to appear before the Tribal Council and to undertake, under oath, to justify their actions in formulating and accepting the water rights claim and utilizing the data upon which it was prepared.

In the accompanying memorandum prepared by Special Council for the Tribe, there is chronicled in great detail the extent and nature of the highly objectionable aspects

of the water rights claim and the data that was used in the formulation of it.

I would appreciate hearing from you at an early date to the end that both the claim and the data giving rise to it no longer continue to be threats to the Tribe and to the Tribe's invaluable Salt River rights.

Sincerely,

/s/ Ronnie Lupe
RONNIE LUPE
Tribal Chairman
White Mountain Apache Tribe

RL:bb

[SEAL]

## APPENDIX B

U.S. DEPARTMENT OF JUSTICE

LAND AND NATURAL RESOURCES DIVISION

Office of the Assistant Attorney General

*Washington, D.C. 20530*

18 Aug., 1982

Ronnie Lupe, Chairman
White Mountain Apache Tribe
Post Office Box 1150
White River, Arizona 85941

Dear Mr. Lupe:

Your letter of April 14, 1982 to the Attorney General concerning the preparation of reserved water rights claims on behalf of the White Mountain Apache Tribe for filing in the Arizona state court proceeding (No. W-1 Maricopa County Superior Court) has been forwarded to me for response.

As we said to you in our letter of March 26, 1982, and reiterate here, this matter is in litigation between the United States and your Tribe and will be affected by other litigation concerning the State's jurisdiction in No. W-1 which may terminate the state proceeding. Our views as to the appropriate federal role have been expressed in our court filings as well as in previous letters to you from Department of Justice officials. Because the issue is still in litigation, where the Tribe is represented by counsel, further comment here would be inappropriate. We also note in this regard that the Department of the Interior in its May 19, 1982 reply to your letter of April

14, 1982, responded substantively and at some length to your criticisms of the United States' preparation of the claim for the No. W-1 stream adjudication.

Finally, we join the Department of the Interior and urge once again the request, made in our March 26 letter, that you work with the United States in preparation of the claim involving the Tribe's *Winters* rights. As stated in the March letter, if and when the filing of such a claim becomes necessary, we hope it can be prepared and filed with the Tribe's cooperation. In this connection, we emphasize Interior's request that you share with them the completed work on Contract No. H50C14201279 and provide them an opportunity to review the work of your consultants on the Tribe's reserved water rights.

Sincerely,

CAROL E. DINKINS
Assistant Attorney General

cc:

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